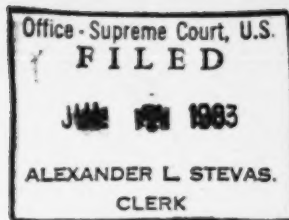


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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

CARLOS L. JIMENA, Petitioner,

v.

BOARD OF REVIEW OF THE UTAH INDUSTRIAL
COMMISSION AND UTAH DEPARTMENT OF
EMPLOYMENT SECURITY, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UTAH STATE SUPREME COURT IN CASE NO. 18901

CARLOS L. JIMENA
Petitioner
P.O. Box 1304
Portland, Oregon 97207
Counsel in his own behalf

QUESTIONS PRESENTED

1. Whether a state agency in Utah can compel an out of state resident and citizen of Oregon to submit to a telephonic hearing without violating the latter's right to due process guaranteed by the 14th Amendment of the U.S. Constitution and without violating the territorial integrity and sovereignty of Oregon.

2. Whether it is the U.S. District Court in Portland, Oregon or the Utah Supreme Court which has jurisdiction over the person of the petitioner and the subject matter in this case

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PETITION FOR WRIT OF CERTIORARI

The petitioner Carlos L. Jimena respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Utah State Supreme Court entered in this proceeding on May 11, 1983.

OPINION BELOW

The opinion of the Utah Supreme Court appears in Appendix A1 hereto which affirmed the opinion of the Board of Review of the Utah Industrial Commission. (Appendix A2-8) In brief the Court below and the Utah Board of Review were of the opinion that interstate telephonic hearing does not violate petitioner's right to due process guaranteed by the 14th Amendment of the U.S. Constitution, does not violate the territorial integrity and sovereignty of Oregon and both have jurisdiction over the person of petitioner and the subject matter in this case.

JURISDICTION

The judgment of the Utah Supreme Court was entered on May 11, 1983. This petition for certiorari was filed within 90 days from that date.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether a state agency in Utah can compel an out of state resident and citizen of Oregon to submit to a telephonic hearing without violating the latter's right to due process guaranteed by the 14th Amendment of the U.S. Constitution and without violating the territorial integrity and sovereignty of Oregon.

2. Whether it is the U.S. District Court in Portland, Oregon or the Utah Supreme Court which has jurisdiction over the person of the petitioner and the subject matter in this case

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment, Art. XIV, Sec. 1:

"xxx or shall any State deprive any person of life, liberty, or property without due process of law;xxx"

Amendment, Art. X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people."

FEDERAL LAWS INVOLVED

United States Code, Title 26, Sec. 3304(a)(9)(A):

"compensation shall not be denied or reduced to an individual solely because he files a claim in another state (or xxx) or because he resides in another state (orxxx) at the time he files a claim for unemployment compensation:"

United States Code, Title 28 Sec. 1343(a):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

xxx

(3) To redress the deprivation, under color of any State law, statute, ordinance regulation, custom, usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."
(underscoring mine)

STATE LAW INVOLVED

Utah Employment Security Act, Sec. 35-4-22, (m) (1):

"An individual is deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount."

STATEMENT OF THE CASE

From February 7, 1982 until July 31, 1982 petitioner received unemployment compensation benefits from the Utah Department of Employment Security, hereinafter referred to as the Employment Security. Later petitioner obtained a private investigator's license

from the City of Medford, Oregon covering the period of July 29, 1982 to December 31, 1982 and another license from the City of Portland, Oregon covering the period August 26, 1982 to December 31, 1982. (R.0056) Beginning August 1, 1982 the Employment Security Representative denied benefits to petitioner (R.0069) based on his claim report for the weeks ended August 7 and 14, 1982 (R.0073) where he reported his activities as follows:

- 8/2/82- petitioner sought customers by publishing an advertisement in the Mail Tribune, Medford, Oregon
- 8/3/82- petitioner sent a letter of application as notary public to the Governor of Oregon
- 8/4/82- same as 8/2/82
- 8/5/82- Hired Michael Simonsen to distribute leaflets of advertisement
- 8/6/82- Hired Scott Lucas to distribute leaflets of advertisement
- 8/9/82- Advertised business for three weeks in Pennysaver
- 8/10/82- solicit customers by calling law offices in Medford, Oregon
- 8/11/82- same as 8/9/82
- 8/12/82- same as 8/9/82
- 8/13/82- Hired Scott Lucas to distribute leaflets of advertisement

The Employment Security Representative applying to the above facts Sec. 35-4-22, m,1, quoted on page 3 hereof denied benefits to petitioner.

The representative referred the claim to the Appeal Referee who on September 23, 1982 affirmed the former's decision without holding any hearing. (R.0064) Against the latter decision petitioner appealed to the Board of Review contesting the decision on the ground that under Sec. 35-4-22,m,1, Utah Employment Security Act (quoted on p. 3 hereof) petitioner should be considered unemployed because based on his activities consisting of client solicitations (p. 4 hereof) he performed no service to a client and hence no wages were payable to him. (R.0052) Because of the failure of the Appeal Referee to conduct an initial hearing, the Board of Review issued a decision on October 26, 1982 remanding the case for a full hearing on the issue of whether petitioner is not unemployed under Sec. 35-4-22,m,1, Utah Employment Security Act. (R. 0042) Based on this decision the Appeal Referee set the case for initial hearing on November 12, 1982 where he will receive the evidence of petitioner, both testimonial and

'documentary, by telephone in petitioner's Oregon residence. (R.0040) Before this date, on November 7, 1982 petitioner objected to the telephone hearing because of the difficulty of presenting testimonial and documentary evidence and hence violative of the due process clause of the 14th Amendment of the U.S. Constitution; petitioner further objected on the basis that the Utah Appeal Referee cannot acquire jurisdiction over his person in Oregon and the claim or subject matter; since at this point the constitutionality of the telephone hearing came out in issue, the case falls within the jurisdiction of the U.S. District Court of Portland, Oregon under Title 28 U.S.C. Sec. 1343(a) quoted on page 3 hereof(par.6-9,R.0029-31) as it always should. (26 U.S.C.&3304,a,9,A)

The penalty for petitioner's objection and failure to participate on the November 12, 1982 telephone hearing on constitutional and jurisdictional grounds was met by another decision of denial of unemployment compensation benefits when the Appeal Referee merely reiterated his former decision.(R.0037) For the

second time petitioner appealed to the Board of Review raising the same constitutional due process and jurisdiction issues. (par. 3,4, R.0024, par. 9-10, R.0026, par. 12, R.0027, R.0028) On December 14, 1982 the Utah Board of Review in its decision upheld the constitutionality and not in violation of due process the telephone hearing and ruled that it has jurisdiction over petitioner and subject matter of this case; it found that petitioner refused to participate in the telephonic hearing on constitutional and jurisdictional grounds and penalized petitioner by denying unemployment compensation benefits.(R.0018-20, Appendix A2-A8). Against the latter decision, petitioner filed a petition for review before the Utah Supreme Court raising the same constitutional and jurisdiction issue. (par. 5.1, 5.3, R.0003, par. 5.4, R.0004) On May 11, 1983 the Utah Supreme Court, after accepting the brief of respondents which was filed out of time (see p.22 hereof), affirmed the Board's decision (Appendix A2-8) but ordered the

non-publication of its decision. The latter decision is now the subject of the present petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURT OF APPEALS, OTHER STATE SUPREME COURT, ITS OWN PRECEDENT, AND THE DECISION AND DOCTRINAIRE PRINCIPLE ANNOUNCED BY THIS COURT.

The decision below upheld as constitutional and not in violation of due process the telephonic hearing conducted in the office of the Appeal Referee in Utah over petitioner, a claimant citizen and resident of Oregon, who is ordered to be in his own home telephone in Oregon at a specific time to attend the hearing, disobedience of which would result in denial of unemployment compensation. Petitioner failed to do so; hence, his unemployment compensation was denied. (Appendix A2 - A8)

The Utah Board of Review as affirmed by the Utah Supreme Court relied on the cases of Slattery v. Unemployment Insurance Appeals Board, 60 Cal.App. 3d 245 (1976) decided by the California Court of Appeals and Greenburg

v. Simms Merchant Police Service, 410 So. 2d 566 (1982) decided by the District Court of Appeals of Florida. The latter two cases conflict with the decision of the District Court of Columbia Court of Appeals in the case of Raymond G. Simmons v. District Unemployment Compensation Board, 292 A. 2d 797,800,(1972) District of Columbia Court of Appeals in the case of Feldman v. Board of Pharmacy of District of Columbia 160 A.2d 100, 103 (1960), the State Supreme Court of Wisconsin in Shawley v. Industrial Comm.(1962), 16 Wis 2d 535, 114 N.W. 2d 872, 875-876, the U.S. Court of Appeals in Gamble-Skogmo Inc. v. FTC, 211 F. 2d 106, 115 (8th Cir. 1954), the U.S. Court of Appeals in District Court of Columbia v. Feldman, 108 U.S. App. D.C. 46, 279 F. 2d 821 (1960) where in those cases it was held that fairness requires that the demeanor of a witness should be considered, otherwise, due process is lacking as guaranteed under the 14th Amendment of the U.S. Constitution. It is obvious that the Appeal Referee in Utah cannot

observe the demeanor of the witness testifying over the telephone in Oregon.

The decision of the Court below is contrary to the principle announced in its own case, *Crow v. Industrial Commission of Utah*, 140 P. 2d 321, 322 (1943) which is quoted as follows:

"Only a person who actually hears and sees a witness while testifying is in a position to determine the weight or credibility which should be given to such testimony." (cited by the Supreme Court of Wisconsin in *Shawley v. Ind. Com.*, supra, p. 876) (underscoring mine)

The decision of the Court below is in conflict with the doctrine announced by this Court in *Morgan v. United States*, 298 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L. Ed. 1288 (1936) where it was held that "the one who decides must hear." Obviously, this means that the hearing officer must be able to see the demeanor of witnesses so as to be able to tell whether the witness is telling the truth.

The decision below runs counter to the decision and doctrine announced by this Court in *Pennoyer v. Neff*, 95 U.S. 714 (1877) where it was held:

"The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power and be resisted as mere abuse." (p. 720) (underscoring mine)

"Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them." (Pennoyer v. Neff, supra, p. 727 (1877))

The above doctrine finds basis under the Tenth Amendment of the U.S. Constitution quoted on page 2 hereof. Thus if it is true as found by the Court below that petitioner refused to participate in a hearing conducted in Utah whose presence was in Oregon, it is for the reason that the coercive power of the Appeal Referee in Utah cannot extend beyond the boundaries of Utah and reach petitioner, a resident and citizen of Oregon, by means of a telephone and compel him to submit to a Utah hearing. Petitioner's objection and resistance to that coercive power was met with and was used as basis for denying his claim for unemployment compensation. This must be overturned.

The Appeal Referee in Utah in **extending**

his arm in Oregon violated the territorial integrity and sovereignty of Oregon as preserved by the Tenth Amendment, U.S. Constitution.

The Appeal Referee in Utah cannot assume jurisdiction over the person of an out of state citizen and resident who objects to the exercise of his coercive power. He must resort to other means by either utilizing the powers of the State of Oregon or the federal court. It is for this reason that states should have reciprocal agreements in hearing unemployment compensation cases. Unfortunately, Utah and Oregon do not have that.

In upholding the constitutionality of telephonic hearing, the Court below relied on two major cases: *Slattery v. California Unemployment Ins. Appeals Board* (1976) 60 Cal. App. 3d 245, 131 Cal. Rptr. 422, decided by the California Court of Appeals and *Greenburg v. Simms Merchants Police Service*, 410 So. 2d 566 (1982) decided by the Florida District Court of Appeals.

An analysis of the two cases fails to

support the ruling of the Board of Review. The decision of the Florida District Court of Appeals relied basically on the fact that the issue of telephonic hearing as violative of due process was not raised at the first opportunity but was raised for the first time on appeal. (Slattery case, supra, p. 567)

Hence statements by the court in Greenburg case justifying telephone hearing was of secondary weight because the court did not choose to rest its decision squarely on them,

The weakness of the Greenburg case as authority is shown further by relying on the Slattery case. The latter case does not support the former because the facts are different and neither the claimant nor respondent raised the issue of whether telephonic hearing violates due process so that statements made by the court concerning a telephone hearing are mere obiter dictum or not controlling in the case.

Factual differences. In the Slattery case, the telephone hearing was within the State of California, one party in Eureka and the other

in Los Angeles. No party was an out of state resident. It did not concern an interstate claim. In the Greenburg case, claimant was an out of state resident and the telephone hearing reached out of state. It dealt with an interstate claim. The Slattery case did not involve the sovereignty of another state so that no conflicts of laws rule operated. In the Greenburg case, as it is in the instant case, the sovereignty and territorial integrity of another state was involved which should have applied a conflict of laws rule.

The factual differences between the Slattery and Greenburg cases calls for the application of different principles. An interstate claim should be differentiated from one that is not.

When the constitutionality of telephonic hearing arose as an issue before the Appeal Referee in Utah, the jurisdiction of the U.S. District Court of Portland, (Or) came more into play. The latter court has original jurisdiction to decide the constitutional issue under Title 28 U.S.C. Sec. 1343(a) quoted on page 3

hereof and the rest of the issues goes with it.

The Utah Supreme Court abused its discretion in not declining jurisdiction (if ever it has jurisdiction) in this case and instead should have ordered the records forwarded to the U.S. District Court of Portland, Oregon where petitioner resides and can pay the filing fee and the case considered originally filed following the doctrine of forum non conveniens announced by this Court in the case of Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 507-8 (1947). When the petitioner urged the lower court to do so but it refused, the refusal runs counter to the doctrine of forum non conveniens enunciated by this Court.

"(4) A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision. See Katzinger v. Chicago Metallic Mfg. Co. 329 U.S. 394, and MacGregor v. Westinghouse Co. 329 U.S. 402.

(5) A conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari. See William E. Arnold Co. v. Parking Corp. 417 U.S. 12, 14 (1974) Pittsburgh v. Alco 417 U.S. 369-72

(6) A conflict between decisions of the highest courts of two or more states on a federal question is also a valid ground for Supreme

Court review. xxx (United States v. Oregon, 366 U.S. 643, 645; Citizens & Southern National Bank v. Bougas, 434 U.S. 35)xxx

xxx

(8) Where a state court has decided a substantial and unsettled federal question arising under the Constitution or where it has rendered an erroneous or at least a doubtful decision on such a question, the Supreme Court frequently grants the petition for a writ of certiorari despite the absence of a conflict. (See Pernell v. Southall Realty, 416 U.S. 363, 365; Davis v. Alaska, 415 U.S. 308, 315; Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 565; Rice v. Sioux City Cemetery 349 U.S. 70.)" Stern & Gressman, Supreme Court Practice, 5th ed., p. 316)

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS WHICH HAS A DIFFERENT APPROACH AND SOLUTION TO THE PROCEDURAL PROBLEM.

It was held by the U.S. Court of Appeals in Barr v. U.S. et. al. 478 F. 2d 1152, 1156 (1973) that in interstate appeals procedure concerning unemployment compensation cases Title 26 U.S.C. Sec. 3304(a) (9) (A) quoted on page 3 hereof, it "permitted only the taking of testimony and transmitting the same to the state against which the claim was asserted." If this ruling is to be followed in this case, then the Court below should have ordered that instead of an interstate telephonic hearing,

petitioner's claim should be heard by the Appeals Referee of the Employment Division, State of Oregon who has the opportunity of observing the demeanor of petitioner while testifying and other witnesses. After taking the evidence and testimony he then should forward the record to the state liable for unemployment compensation, the State of Utah for the issuance of the appropriate order. At this point the case of *Simmons v. District Unemployment Compensation Board*, 292 A.2d 297, 800 (1972) footnote 4, decided by the District of Columbia Court of Appeals held that the Appeal Referee taking the evidence out of state (in Oregon) should likewise make findings of facts and conclusions of law.

III. THE DECISION OF THE COURT BELOW RELIED ON FEDERAL LAW GROUNDS, RATHER THAN ON STATE LAW GROUNDS, IN DENYING UNEMPLOYMENT COMPENSATION TO PETITIONER.

Sec. 35-4-22(m) (1), Utah Employment Security Act defines "unemployed" as quoted on page 3 hereof. Under that definition there are two elements to look into: (1) Did the individual perform service? (2) Was he paid or to

be paid wages for that service?

Applying the aforequoted state law to petitioner's activities consisting of client solicitation for the weeks ended August 7 and 14, 1982 as stated on page 4 hereof would show the erroneousess of the Board of Review's decision as adopted by the Utah Supreme Court.

The first element of the law is did petitioner perform services to a client? The question cannot be that petitioner performed service to himself because he does not pay wages to himself. His wages or earnings come from the client.

During the two weeks period of activity as recited on page 4 hereof (R.0073) petitioner did no service to a client because there was no client to serve yet. Those are acts of solicitation for a client that do not occupy the time of petitioner eight hours a day. Seven to eight hours a day petitioner is idle when there is no client as he never did have a client for the weeks ended August 7 and 14, 1982. Hence the first element of the state

law as applied to the facts is absent and the denial of benefits under the above law is incorrect.

Now let us go to the second element of the law. Was petitioner paid or to be paid wages for his services as private investigator? The answer is no again because there was no client who would pay him remuneration.

The law as applied to the facts show that petitioner is unemployed. If there is any doubt as to the interpretation of the law, the doubt is resolved in favor of the employee or worker.

"Doubts should be resolved in favor of the coverage of the employee." (Johnson v. Board of Review (1958) 320 P. 2d 315, 318)

Petitioner argued this matter before the Utah Supreme Court, pp. 6-8 of his Reply to Respondent's Brief, but it was disregarded because despite the correctness of petitioner's argument, the decision of the Utah Board could stand mainly on federal law grounds, i.e. petitioner refused to participate in the telephonic hearing which was held constitutional

and not in violation of due process. To quote the Board of Review:

"In the face of such conflicting evidence, the Appeal Referee and the Board of Review are not compelled to act upon plaintiff's unsworn claim forms in view of the fact that many questions could have been answered had the plaintiff seen fit to appear at the hearing." (p. A7 , Appendix hereof) (underscoring mine)

Ergo, petitioner stands to suffer the consequences by asserting his rights under the U.S. Constitution.

Please note that the decision of the Board of Review is conflicting. At the first paragraph of the decision (.Appendix A2 hereof) it found the petitioner not unemployed . At the last paragraph of the decision as quoted above, it found the evidence "conflicting" and great reliance for denying unemployment compensation was placed on petitioner's refusal to participate in the interstate hearing (to clarify the alleged conflict) based on constitutional and jurisdictional grounds. In either way, the decision is wrong.

IV. THE ISSUE OF THE CONSTITUTIONALITY OF INTERSTATE TELEPHONIC HEARING AS VIOLATIVE OF DUE PROCESS IS A QUESTION OF FIRST IMPRESSION BEFORE THIS COURT.

No case decided by this Court can be found which upholds or turns down the constitutionality of interstate telephonic hearing. This issue is presented for the first time before this Court which is a good reason for giving due course to the instant petition.

V. THE COURT BELOW WAS BIASED AND PREJUDICED IN ITS PROCEEDINGS. IT ABUSED ITS POWERS WHICH ONLY THIS U.S. SUPREME COURT CAN CORRECT.

Petitioner is an out of stater, an Oregonian, while respondents are in Utah. There is therefore diversity in this case. The warning by some writers that the reason for the diversity rule is because of the bias and prejudice against out of state litigants came true in this case. (Wright, Miller, Cooper, Federal Practice and Procedure, Vol. 13, 1975, p. 574 citing cases)

In the proceedings before the Utah Supreme Court, respondents last day for filing their brief was March 18, 1983. Attorneys for respondents incorrectly computed their last day for filing to be on March 21, 1983. On the latter date, they filed a motion for extension

of time. (Appendix A9) On March 23, 1983 petitioner filed an opposition to that motion for extension of time (Appendix A10) because there was no more time to extend. Strangely enough, contrary to its rules, the Utah Supreme Court still granted respondents motion for extension of time. (Apndix.A14) This is a clear evidence of bias and prejudice against an out of state litigant.

Again when the decision of the Court below was rendered, it ordered its decision "not for publication." Why? So that its decision will not serve as a precedent for other states to follow? If its decision is good law, let every American know about it. Petitioner is not ashamed nor is he afraid that the facts of this case be published. Petitioner is not ashamed for every American to know that he left his job because he was discriminated by the Mormons which is the reason for placing him under unemployment compensation from February to July 1982. (par. 1, R.0029) We cannot hide the truth and there is nothing to hide.

The Court below abused its power by ordering its decision not to be published as if there is something to hide. Publication of a decision is the only assurance to the American people that a public duty was well done.

By way of closing, interstate telephonic hearing cannot be sustained on practical grounds because (1) the hearing officer does not see who is the other person at the end of the telephone line; he cannot identify him if he is the claimant or not; (2) the witness may be reading his testimony from a prepared transcript but the hearing officer does not know about that because he does not see the witness. Hence, telephonic hearing opens the door to fraudulent claims.

CONCLUSION

FOR ALL THE FOREGOING REASONS, it is respectfully prayed that a writ of certiorari issue to review the judgment and opinion of the Utah State Supreme Court affirming the decision of the Board of Review, Utah Industrial Commission. Other equitable relief is

praved for.

Respectfully Submitted,

Carlos L. Jimena

CARLOS L. JIMENA

Petitioner

P.O. Box 1304

Portland, Oregon 97207

Counsel in his own behalf

June 8, 1983

Proof of Service

I hereby certify that on this 8th day of June, 1983, three copies of the Petition for certiorari were mailed, postage prepaid, to David L. Wilkinson, Utah Attorney General, thru his Special Assistant, K. Allan Zabel, 174 Social Hall Avenue, Salt Lake City, Utah 84147, Counsel for Respondents. I further certify that all parties required to be served have been served.

Carlos L. Jimena

CARLOS L. JIMENA

Petitioner, Pro Se

P.O. Box 1304

Portland, Oregon 97207

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

Carlos L. Jimena,
Plaintiff-Appellant,

No. 18901

F I L E D

v

May 11, 1983

Department of Employment
Security,

Defendant-Respondent.

Stewart, Justice:

Geoffrey J. Butler,
Clerk

This case is here on a petition for re-
view of an order of the Board of Review of the
Industrial Commission denying unemployment
benefits to petitioner. Numerous issues are
raised by petitioner. To the extent that the
issues raised are not frivolous, they have
been adequately dealt with by the opinion of
the Board of Review.

We affirm the order of the Board of Re-
Biew. No costs.

Not for publication. _____

WE CONCUR:

Gordon R. Hall, Chief Justice

Dallin H. Oaks, Justice

Richard C. Howe, Justice

Christine M. Durham, Justice

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

CARLOS L. JIMENA
S.S.A. No. 553 39 3140

Case No. 82-A-3888

DECISION

vs.

Case No. 82-BR-461

DEPARTMENT OF EMPLOYMENT
SECURITY.

After careful consideration of the record and testimony in the above-entitled matter, the Board of Review hereby affirms the decision of the Appeal Referee which denied benefits to the claimant effective August 1, 1982, pursuant to Section 35-4-22(m)(1) of the Utah Employment Security Act, on the grounds the claimant is not considered unemployed.

In affirming the decision of the Appeal Referee, the Board of Review notes that the claimant refused to participate in a hearing with the Appeal Referee on the basis that a telephone hearing does not meet the requirements of due process. Prior to the use of the telephone for unemployment insurance hearings, claimants who resided outside the boundaries

of the state from which benefits were being paid were compelled to participate in a hearing before the Referee of their state of residence who was not versed in the law of the liable state and, therefore, could not render a decision in the matter. Thus, the case was heard by an administrative law judge, or other hearing officer, in one state and decided by a hearing officer in another state. If more than one party participated in a hearing such as the claimant in one state and the employer in another state, each party was allowed to testify independently of the other and cross-examination was not possible. The telephone hearing concept came about as a response to the due process problems of the bifurcated hearing.

Due process requires a trial-type hearing on disputed adjudicative facts except when other methods of ascertaining the facts may be better, or when a cost benefit analysis establishes that a trial procedure is outweighed by its deprivation. Davis, Administrative Law

Treatise, Vol. 2, 2d Edition (1976, Chap. 12.1, P.406.) The protection of due process in administrative law necessarily involves the weighing of three factors: 1) the private interest of the individual; 2) the risk of erroneous deprivation or loss of rights through the procedure used, as related to the probable value, if any, of additional or substitute procedural safeguards; and 3) the government interest involved, including the fiscal and administrative burdens that additional or substitute procedural requirements would impose on the government. Matthews v. Eldridge, 424 U.S. 319 (1976). Several courts in the nation have had an opportunity to deal with this question and have almost unanimously held that telephonic hearings in unemployment insurance cases meet the requirements of due process; Slattery v. California Unemployment Insurance Appeals Board, 60 Cal. App. 3d 245, 131 Cal. Rptr. 422; Greenberg v. Simms Merchant Police Service, 410 So. 2d 566 (1982); Okitkun v. Orbeck, 3d Judicial District Super-

ior Court, Alaska, Case No. 76-8627, decided and filed August 18, 1978; in re Maxine White Bull, Memorandum Opinion, Case No. 499, So. Central Judicial District Court for North Dakota, decided September 2, 1981. Therefore, this Board concludes that the claimant's objection to a telephone hearing is not supportable in law and his failure to participate in the hearing is without good cause.

The Appeal Referee issued a decision affirming the original denial of benefits and the claimant appealed to the Board of Review. After reviewing the matter, the Board of Review remanded the case to the Appeal Referee for a new hearing, explaining that the issue of self-employment often involves complex factual determinations and that the Department of Employment Security is entitled to interview the claimant under oath to determine the validity of any factual assertions which he has made concerning the issue. The claimant again objected to the remand of the matter to the Appeal Referee and refused to participate

in a second hearing, filing an objection to venue, jurisdiction, procedure and motion to forward the entire records of the case to the U.S. District Court of Portland, Oregon. This Board of Review holds that the District Court of Portland is not a proper court of jurisdiction in this matter and that the Department of Employment Security has jurisdiction of the claim for benefits pursuant to Sections 35-4-6 and 35-4-10 of the Utah Employment Security Act, subject to final judicial determination in the Supreme Court of the State of Utah.

Inasmuch as the claimant has now had ample opportunity to present his case to the Appeal Referee, the Board of Review herewith affirms the decision of the Appeal Referee, noting that the only evidence supporting plaintiff's claim for benefits are his weekly claim forms, Forms IB-2, for the weeks ended August 7 through August 28, 1982 on which the claimant has reported various employer contacts. This evidence, however, conflicts with the claimant's statement made on August 2, 1982 on Form IB-11,

Self-Employment Questionnaire, on which the claimant reported that he had not previously worked full time in other employment while being self-employed, that he was devoting full time to his business on a daily basis and that he would drop self-employment for other full time work only for an equivalent earning. In the face of such conflicting evidence, the Appeal Referee and the Board of Review are not compelled to act upon plaintiff's unsworn claim forms in view of the fact that many questions could have been answered had the plaintiff seen fit to appear at the hearing. Stumph v. Gronning et. al, Utah Supreme Court, Case No. 15662, filed September 29, 1978.

This decision will become final ten days after the date of mailing hereof, and any further appeal must be made directly with the Utah Supreme Court at the State Capitol Building, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Supreme Court you must submit

A8

to the Clerk of the Court a Petition for Writ
of Review pursuant to Section 35-4-10(i) of
the Utah Employment Security Act.

BOARD OF REVIEW

(SGD) Stephen M. Hadley

(SGD) James F. Hannan

(SGD) Richard H. Schone

Dated this 14th day of December, 1982

Date mailed: December 21, 1982

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

CARLOS L. JIMENA,
Plaintiff-Appellant,

MOTION AND ORDER
FOR EX-PARTE EXTEN-
SION OF TIME WITHIN
WHICH TO SUBMIT THE
DEFENDANT'S BRIEF

v.

BOARD OF REVIEW, ET. AL.
Defendants-Respondents

Case No. 18901

TO THE SUPREME COURT OF THE STATE OF UTAH AND
THE HONORABLE JUSTICES THEREOF:

COMES NOW the Defendant, the Industrial
Commission of Utah, Department of Employment
Security, and respectfully moves the Court
for an ex parte extension of time within which
to submit the Defendant's Brief in the above-
entitled cause of action, on the basis of a
breakdown in the printing equipment of the
Defendant. The Brief was originally due on
March 21, 1983.

Therefore, pursuant to Rule 76(f), Utah
Rules of Civil Procedure, the Defendant req-
uests an ex parte extension of two weeks, to
and including March 25, 1983, in which to sub-
mit Defendant's Brief.

Dated this 21st day of March, 1983.

(SGD) K. ALLAN ZABEL
Attorney for Defendant

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

CARLOS L. JIMENA,
Plaintiff-Appellant,

v.

Supreme Court No.
18901

DEPARTMENT OF EMPLOYMENT
SECURITY, ET.AL.,
Defendant-Respondents.

OPPOSITION TO MOTION FOR EXTENSION OF TIME
TO FILE BRIEF REQUESTED BY RESPONDENTS AND
MOTION TO STRIKE OUT THEIR BRIEF, IF ANY IS
FILED

COMES NOW Appellant, thru himself as coun-
sel, and before this Honorable Supreme Court
respectfully states:

1. That on March 23, 1983 appellant rec-
eived a copy of respondents ex-parte motion
dated March 21, 1983 to extend the one month
period within which they will file their brief;

2. That respondents motion for extension
of time to file their brief is misleading to
this Honorable Supreme Court because there was
no more time to extend as will be pointed out
hereinafter;

3. That appellant's mailing certificate
(p. 27 of his brief) shows that he mailed two

copies of his brief to each of the respondents on February 18, 1983; that in accordance with the Rules appellant mailed his brief directly to respondents because no attorney entered his appearance on their behalf; that on the same date of mailing appellant completed the service of his brief on respondents.

"Service upon... a party shall be made by mailing it to him at his known address... Service by mail is complete upon mailing."
(Utah Rules of Civil Procedure, Rule 5,b,1)

4. That Rule 75(p) (1), Utah Rules of Civil Procedure states that respondents shall file their brief "Within one month after the service upon him of appellant's brief,xxx;" that the meaning of "month" as used in the Rules is calendar month as held by this Honorable Supreme Court in the following cases:

"One month is a calendar month not a lunar month of 28 days, nor is it necessarily 30 days. Such a month commences at the beginning of the day of the month on which it starts and ends at the expiration of the day before the same day of the next month. Thus a month which starts with the beginning of the first day of a calendar month would end at the end of the last day of such month, and not at the last end of the first day of the next month. If the month in question commenced on a day

other than the first day of such month, such as at the beginning of the 23rd day of such month, it would end at the expiration of the 22nd day of the next month and not at the expiration of the 23rd day of the next month, which would be the beginning of another month. In the present case we exclude from our calculation the day of the act or event after which the designated period of time begins to run, which is NOVember 22 the day on which the motion was overruled, and start counting from the beginning of the 23rd of that month; from that time one month would end at the expiration of the 22nd day of December, or just before the 23rd commenced, which marked the beginning of another month." (In re Lynch's Estate, Utah 1953, 254 P.2d 454-455, 123 Utah 57; followed and quoted in Anderson v. Anderson, Utah 1955, 282 P.2d 845, 3 Utah 2d 277) (underscoring mine)

5. That following the aforecited cases, February 18, 1983 the day appellant completed the service of his brief on respondents by mailing it to them, is the event after which the designated period begins to run. From that time one month would end at the expiration of the 18th day of March 1983, or just before the 19th commenced, which marked the beginning of another month.

6. That therefore, respondents motion for extension of time having been filed on March 21, 1983 was three days late and there was no more time to extend.

7. That it is expected that litigants should follow the rules;

"Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing."(Nunley v. Stan Katz Real Estate, Inc., 1964, 388 P.2d 798, 801, 15 Utah 2d 126; Holton v. Holton, Utah 1952, 243 P.2d 438, 439; Anderson v. Anderson 1955, 282 P.2d 845, 848, 3 Utah 2d 277)

8. That in the event respondents already filed their brief, the same should be ordered stricken out as having been filed out of time.

WHEREFORE, it is respectfully prayed that no extension of time to file brief be granted to respondents; that if an extension of time was granted the same be ordered revoked; that if any brief was filed by any or both respondents, it is likewise prayed that they be ordered stricken out of the record and that this case be declared submitted for decision. Other equitable relief is prayed for.

Portland, Oregon for Salt Lake City, Utah
March 23, 1983.

(SGD) CARLOS L. JIMENA
Petitioner
(address omitted)

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH
Regular February Term, 1983 April 11, 1983

Carlos L. Jimena,
Plaintiff,

v.

MINUTE ENTRY
No. 18901

The Industrial Commission
of Utah, Department of
Employment Security,
Defendant. -----

Defendant's ex-parte motion for an extension of time to file defendant's brief, up to and including March 25, 1983, is granted in accordance with Rule 76 (f), Utah Rules of Civil Procedure.

Plaintiff's motion for an order removing defendant's brief from the record is denied.

(no name of Justice)

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term

No. 83-11

CARLOS L. JIMENA,

Petitioner,

vs.

**BOARD OF REVIEW OF THE
UTAH INDUSTRIAL COMMISSION AND THE
UTAH DEPARTMENT OF EMPLOYMENT SECURITY,**

Respondents.

**BRIEF IN OPPOSITION TO GRANTING A
WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF UTAH**

**FRANK MATHESON
K. ALLAN ZABEL**

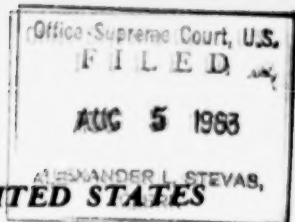
174 Social Hall Avenue
Salt Lake City, Utah 84111

Assistants to

DAVID L. WILKINSON

Utah Attorney General

Attorneys for Respondents



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IN THE
SUPREME COURT OF THE UNITED STATES

October Term

No. 83-11

CARLOS L. JIMENA,

Petitioner,

vs.

BOARD OF REVIEW OF THE
UTAH INDUSTRIAL COMMISSION AND THE
UTAH DEPARTMENT OF EMPLOYMENT SECURITY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING A
WRIT OF CERTIORARI TO THE SUPREME
COURT OF THE STATE OF UTAH

The Respondents, Board of Review of the Utah Industrial Commission and Utah Department of Employment Security respectfully urge that a writ of certiorari should not issue to review the Judgment of the Supreme Court of the State of Utah entered May 11, 1983.

QUESTIONS PRESENTED

Respondents consider the questions presented to be:

1. Whether the use of telephonic hearings by a State agency to determine the eligibility of claimants for unemployment compensation violates the due process requirement of the Fourteenth Amendment of the United States Constitution; and
2. Whether the Utah Supreme Court is deprived of jurisdiction by reason of a claimant having residence in a foreign state.

STATUTORY PROVISION INVOLVED

It is the contention of Petitioner that jurisdiction of his claim for unemployment benefits is placed in the United States District Court for the State of Oregon, by virtue of Title 28, United States Code, § 1343(a); which provides in part as follows:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

STATEMENT OF THE CASE

Respondents substantially agree with the statement of the case set forth in the petition by Petitioner. Petitioner was originally denied

unemployment benefits beginning August 1, 1982 pursuant to Section 35-4-22(m)(1), which provides in part:

An individual is deemed "unemployed" in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with the respect to the week are less than his weekly benefit amount.

Petitioner does not allege a Federal question with respect to the above-quoted provision of law. Rather, he contends factual error in the application of the provision to his case. Petitioner appealed the denial of unemployment benefits but refused to participate in a telephonic hearing. The Appeal Referee issued a default decision affirming the denial of benefits, from which the Petitioner made timely appeal to the Board of Review of the Industrial Commission of Utah. Upon review, the Board of Review remanded the case to the Appeal Referee with instructions to conduct a complete hearing with the Petitioner to ascertain the facts of the case. Upon receipt of notice of the hearing, Petitioner filed a document entitled "Objection to Venue, Jurisdiction, Procedure and Motion to Forward Entire Records of the Case to the U. S. District Court of Portland, Oregon." Petitioner's objection was overruled and his motion for a transfer of records to the U. S. District Court for Oregon was denied and the Appeal Referee

proceeded with the hearing. At the hearing, Petitioner again refused to participate on the grounds that the telephonic hearing procedure violated his right to due process. The Appeal Referee again affirmed the denial of unemployment benefits and Petitioner appealed a second time to the Board of Review of the Industrial Commission of Utah. The Board of Review affirmed the Appeal Referee. Petitioner appealed to the Utah Supreme Court which also affirmed the Board of Review. Petitioner now seeks a writ of certiorari from this court for review of the decision of the Supreme Court of Utah.

The Federal question raised by Petitioner before this court is whether the Utah Department of Employment Security may require Petitioner to participate in a telephonic hearing to ascertain the facts concerning his eligibility for unemployment benefits and whether the Department of Employment Security of the Industrial Commission of Utah and the Utah Supreme Court must waive jurisdiction in favor of the Federal District Court for the State of Oregon.

REASONS FOR DENYING THE WRIT

I. THE RESULT BELOW ACCORDS WITH THE REQUIREMENTS OF DUE PROCESS AS DEFINED BY THIS COURT; IS NOT IN CONFLICT WITH THE DECISIONS OF THE HIGHEST COURT OF ANY OTHER STATE, ANY FEDERAL COURT OR THIS COURT; AND DOES NOT RAISE A SUBSTANTIAL

ISSUE REQUIRING RESOLUTION BY THIS COURT.

Petitioner contends that the telephonic hearing procedure utilized by the Utah Department of Employment Security in hearing appeals on interstate claims for unemployment compensation violates the due process requirement of the Fourteenth Amendment of the United States Constitution. It is Petitioner's position that due process requires the Appeal Referee or other hearing officer to be able to observe the "demeanor" of each witness in the hearing, and that any procedure which eliminates the opportunity to observe such demeanor is violative of due process. Thus, Petitioner's claim pertains to an alleged violation of procedural due process.

The requirements of procedural due process in social welfare cases have been thoroughly explained by the court in the case of *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, L.Ed. 2d (1976). In a careful analysis of the case law concerning procedural due process in social welfare cases, the court stated that:

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner. . ."

These decisions underscore the truism that "[d]ue process, 'unlike some legal rules, is not a technical conception with a

fixed content unrelated to time, place and circumstances.' . . . '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Ibid*, 96 S.Ct., at 902. [Citations omitted.]

The court then went on in the *Matthews* decision to explain the factors involved in determining the requirements of due process in social welfare cases, those factors being: 1) private interest to be affected by official action; 2) the risk of erroneous deprivation or loss of rights through the procedure used, as related to the probable value, if any, of additional or substitute procedural safeguards; and 3) the government interest involved, including the fiscal and administrative burdens that additional or substitute procedural requirements would impose on the government. Although the *Matthews v. Eldridge* decision involved a disability insurance program, this court has been consistent in applying the *Matthews* interpretation of due process in unemployment insurance cases. See *Torres v. New York State Department of Labor*, 333 F. Supp. 431 (S.D.N.Y., 1971), affirmed 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed. 2d 228 (1972); and *Graves v. Meystrik*, 425 F.Supp. 40 (E.D. Mo., 1977), affirmed 431 U.S. 910, 97 S.Ct. 2164, 53 L.Ed. 2d 220 (1977).

Analyzing the facts of the instant case against the test set forth in *Matthews*, it is apparent that the procedures utilized by the Utah Department of Employment Security are consistent with the requirements of due process and are designed to facilitate the proper payment of benefits to those

who are unemployed through no fault of their own. The first factor to be considered is the private interest to be protected. This court has previously held that receipt of disability benefits and unemployment benefits do not rise to the same level as receipt of welfare assistance. See *Matthews v. Eldridge*, *Supra*, and *Fusari v. Steinberg*, 419 U.S. 379, 95 S.C.T. 533, 42 L.Ed. 2d 521 (1975).

This court explained that the welfare assistance program differs from other social welfare programs in that such other programs are not based on financial need. *Id.*, 96 S.Ct. at 905.

The second factor to be considered is the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or a substitute procedural safeguard. In the instant case, the petitioner made a written report that he had entered into self-employment as a private detective, devoting substantially full time to that effort. Based on that report, a Department Representative issued a denial of unemployment benefits. The record in this matter will show that the Petitioner filed his appeal from that decision on August 26, 1982 and that a Notice of Hearing was issued on September 13, 1982, just 18 days after his appeal. A hearing was scheduled for September 23, 1982, less than 30 days after the Petitioner's denial of benefits. Petitioner's complaint is that he was offered only a telephone hearing and that he should have been allowed to present his case before the Federal District Court for the State of Oregon.

The jurisdiction of the Industrial Commission of Utah over claims for benefits and appeals concerning such claims is clearly established in Sections 35-4-6 and 35-4-10 of the Utah Code Annotated 1953. It should be noted that Petitioner filed his claim for unemployment benefits against the State of Utah from the State of Oregon. Petitioner cites the case of *Barr v. United States*, 478 Fed. 2d 1152 (1973) in support of the proposition that the interstate procedure concerning unemployment compensation cases "*permitted only the taking of testimony and transmitting the same to the state against which the claim was asserted.*" See Petitioner's Petition at page 16. The actual quotation from the decision of the Tenth Circuit Court of Appeals is as follows:

The interstate appeals procedure *permits* the taking of testimony before the Commission in the state of a claimant's residence and the transmitting of such testimony to the state against which the claim is asserted. With this the appellant was not content; but to more she was not entitled. 478 Fed. Rptr. 2d, at 1156.

It is important to note the distinction between the quotation given in Petitioner's Petition and what the court actually said. The court's decision did not limit the interstate procedure to the taking of testimony in one state and transmission to another state. The court cited the interstate procedure merely as permitting such in the administration of interstate claims. Furthermore, the court's conclusion was that the claimant was not legally

entitled to more than the procedure which was then utilized for interstate appeals. It should be noted in this regard that Petitioner herein is seeking substantially more than the Tenth Circuit Court stated was required.

For many years, eligibility issues concerning such interstate claims for benefits were addressed by means of a bifurcated hearing. That is, under the former procedures, a hearing officer for the State of Oregon would have conducted a hearing with the claimant in Oregon and transmitted an electronic tape recording or a transcript of that hearing to the hearing officer in Utah. The Utah hearing officer then would have made a decision after reviewing the tape recording or transcript of the Oregon hearing. This procedure left much to be desired. If an adverse party, such as an employer, was located in Utah or a third state, neither party would have had opportunity to effectively cross-examine the other party. Also, the hearing officer in the claimant's state of residence was frequently unfamiliar with the requirements of the liable state's unemployment law, and frequently would fail to ask pertinent questions necessary for a proper resolution of the case under the liable state's law. The telephonic hearing has been a developing response to the imperfections of the bifurcated hearing procedure. Clearly, the risk of an erroneous deprivation of the claimant's interest in unemployment benefits is equally as protected by the telephonic hearing procedure as it would have been under the bifurcated hearing procedure which the petitioner requests in his petition, at page 17.

Petitioner's primary concern with the telephonic hearing is his contention that the hearing officer is unable to observe a witness's demeanor. The cases cited by Petitioner do not support Petitioner's position on this question. On the contrary, several courts across the country have concluded that the telephonic hearing is a better procedural method for adjudicating interstate unemployment benefit appeals than the old bifurcated hearing method. See *Slattery v. California Unemployment Insurance Appeals Board*, 60 Cal. App. 3d 245, 131 Cal. Rptr. 422 (1976); *Greenburg v. Simms Merchant Police Service*, 410 So. 2d 566 (1982). Even in those cases cited by Petitioner which might be considered supportive of his position, the courts did not require that the deciding officer must actually observe the demeanor of the claimant or witness. See *Gamble-Skogmo, Inc. et al v. Federal Trade Commission*, 211 Fed. Rptr. 2d, 106 (1954); *Feldman v. Board of Pharmacy of District of Columbia*, 160 A. 2d, 100 (1960); *Board of Pharmacy of District of Columbia v. Feldman*, 279 Fed. 2d 821 (1960); *Simmons v. District Unemployment Compensation*, 292 A. 2d 797 (1972). It should be specifically noted relative to the *Feldman* and *Simmons* cases that the decisions of the courts rested on the District of Columbia Administrative Proceedings Act and the requirements therein concerning interstate hearings. There are no such equivalent requirements in Utah, which does not have an administrative proceedings act at this point in time.

In support of Petitioner's contention that the decision maker must observe the demeanor of the

parties and witnesses before him/her, and in support of Petitioner's further contention that a writ of certiorari should be granted in the instant matter because the decision of the court below conflicts with a prior decision of that court concerning the issue of demeanor, Petitioner has cited the case of *Crow v. Industrial Commission of Utah*, 140, P. 2d 321 (1943). Like the District of Columbia cases, the Utah Supreme Court in the *Crow* decision did not require that the decision maker actually observe the demeanor of the witnesses; but only that the decision maker have access to the opinion of the hearing officer who conducted the hearing with respect to the testimony provided in the hearing. The court pointed out that its decision in this regard was in harmony with the law on the question regarding commissions and quasi-judicial triers of fact in the Federal courts, citing Treatise and Case Authorities. See *Crow v. Industrial Commission, Supra*, at 322, 323.

Petitioner contends that having the records of his case transmitted to the Federal District Court for the State of Oregon or having the Oregon Employment Security Office conduct the hearing on his case were better alternatives than the telephonic procedure. Another alternative mentioned and rejected by Petitioner would be for him to travel to Utah for an in-person hearing before the Utah Appeals Referee. This alternative was rejected by Petitioner because of the cost. Each of the other alternatives suggested by Petitioner have inherent weaknesses. The Federal District Court could have acquired jurisdiction in the case only

upon a proper filing by the Petitioner in that court. The Industrial Commission of Utah could not confer jurisdiction upon that court by simply transmitting the records to it. This point will be more fully discussed in Point II herein. The weaknesses of the former procedure of having a hearing officer for the State of Oregon conduct the hearing with the claimant in Oregon have already been discussed herein.

The telephonic hearing is a procedure designed to minimize the cost to a claimant who desires to pursue an appeal of his eligibility for unemployment benefits, while affording the Appeal Referee who would be making the decision an opportunity to talk directly with the claimant during the hearing. Also, where other parties and witnesses are involved, the telephonic hearing provides an opportunity for each of the parties to cross-examine the witnesses of the other party. While the telephonic hearing procedure may not be a perfect solution to the problem of hearing interstate unemployment insurance appeals, it at least provides the decision maker with an opportunity to directly hear the witnesses and to ask questions of the witnesses as dictated by the requirements of local law. Such a procedure would appear to be at least equal to the procedure proposed in the cases from the District of Columbia and those proposed by Petitioner. Furthermore, the Federal District Court for Oregon simply did not have jurisdiction to determine the issue of Petitioner's eligibility for benefits under the Utah Employment Security Act because of the failure of

the Petitioner to properly file pleadings with that court.

The final factor to be considered in determining the requirements of procedural due process is the government's interests, including the function involved and the fiscal and administrative burdens that additional or substitute requirements would entail. The government's interest is in administering an unemployment insurance program involving thousands of people and thousands of claims for benefits each week in an efficient and cost effective manner. In analyzing the standards set forth in *Matthews v. Eldridge*, *Supra*, it is clear that the telephonic hearing is an effective and efficient method of protecting an individual's interests and continued receipt of unemployment benefits, particularly when contrasted with other available alternative procedures.

In summary, the requirements of procedural due process are flexible, requiring an analysis of the governmental and private interests that are affected. Such an analysis in the instant case shows that the telephonic hearing procedure offered Petitioner an effective process for asserting his claim to unemployment benefits. As this court stated in *Matthews v. Eldridge*:

All that is necessary is that the procedures be tailored in light of the decision to be made to "the capacities and circumstances of those who are to be heard," [citation omitted] to ensure that they are given a meaningful opportunity to present their case. In assessing what

process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals. 96 S.Ct., at 909.

It is clear from the foregoing that the instant matter does not raise a substantial issue requiring resolution by this court.

II. JURISDICTION OF PETITIONER'S CLAIM FOR UNEMPLOYMENT COMPENSATION PROPERLY RESTED IN THE COURT BELOW.

Section 35-4-6, subparagraphs (a) through (c), Utah Code Annotated 1953, established the jurisdiction of the Industrial Commission of Utah to determine the eligibility of individuals claiming unemployment benefits, and the right of such individuals to appeal from adverse decisions of the commission. Section 35-4-10, Utah Code Annotated 1953, establishes the appeals tribunal and review by the Utah Supreme Court, and concludes with subparagraph (j) which reads as follows:

The procedure herein provided for hearings and decisions with respect to any decision or determination of the commission affecting claimants or employing units under this act and for appeals shall

be the sole and exclusive procedure notwithstanding any other provision of this act.

Section 35-4-10 of the Act provides for appeal from an adverse decision to an appeal referee, who is required to conduct a fair hearing [35-4-10(b)] and to render independent judgment in the matter [35-4-10(c)]. Appeal may then be taken to a board of review, which is appointed by the Governor of the State of Utah. Any party receiving an adverse decision from the Board of Review has the right under Section 35-4-10(i) of the Act to petition the Utah Supreme Court for judicial review.

Petitioner alleges that jurisdiction should reside with the Federal District Court for the State of Oregon on the grounds that he is an Oregon resident, and on the further grounds of forum non conveniens. The fact remains that the Petitioner earned his base period wage credits while working in the State of Utah and that he filed his claim for benefits against the State of Utah. Even though the petitioner resides in the State of Oregon, the Industrial Commission of Utah retains jurisdiction to determine the Petitioner's eligibility for unemployment benefits by virtue of the statutory provisions cited above. See also *Barr v. United States, Supra*. Furthermore, as has been pointed out previously herein, Petitioner has at no time during the course of proceedings in this case filed an action in the Federal District Court with respect to his constitutional claims, nor did he file a removal action to have the case transferred from the Utah Supreme Court to the U.S. District Court for Oregon. Under such circumstances, Petitioner

has not properly invoked the jurisdiction of the Federal District Court.

With respect to the petitioner's contention that he is entitled to transfer of his case to the U.S. District Court for the State of Oregon under the doctrine of forum non conveniens, it is sufficient to point out that the case cited by Petitioner in support of this contention, *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), is not at all supportive of Petitioner's contention. In fact, this court held in the *Gulf Oil Corporation* case that a Federal court is not bound to respect the choice of a plaintiff no matter what the type of suit or issues involved, but may under proper circumstances decline jurisdiction. Further, this court explained that the principle of forum non conveniens is to permit a court to resist imposition upon its jurisdiction even when such jurisdiction is authorized by a statute. In the instant matter, the Petitioner has made no effort to properly invoke the jurisdiction of the U.S. District Court for Oregon.

Finally, the considerations to be weighed in determining whether a court should decline to exercise jurisdiction under the doctrine of forum non conveniens, as set forth in *Gulf Oil Corporation v. Gilbert*, *Supra*, actually operate in favor of the Industrial Commission in the instant matter. However, such considerations are not reached in this case due to the petitioner's failure to properly invoke the jurisdiction of the Federal Court.

With respect to Petitioner's contention that

requiring him to participate in a hearing conducted by an agency of the State of Utah is violative of the Tenth Amendment of the United States Constitution, it should be noted that Petitioner's contention is based on the decision of this court in *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877). The doctrine of *Pennoyer v. Neff* has long since been modified by other decisions of this court, particularly in the case of *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 ALR 1057 (1945). *International Shoe* is a case involving an attempt by the Washington Employment Security Division to collect delinquent unemployment taxes from a corporation which had no offices in the State of Washington but did have sales representatives operating within the state. Referring to *Pennoyer v. Neff*, the court pointed out that one state may obtain personal jurisdiction over a party in another state if that party had certain minimum contacts with the first state such that maintenance of the suit would not offend traditional notions of fair play and substantial justice.

Although the instant matter is not exactly identical with *International Shoe Co.*, the basis of jurisdiction for the Utah Industrial Commission to hear and decide the Petitioner's appeal is even stronger. In the instant matter, the Commission has not sought an in-personam judgment against the Petitioner. Rather, Petitioner is seeking benefits from the State of Utah in the form of unemployment compensation. As cited previously herein, the Utah Employment Security Act specifically grants to the Industrial Commission and

the Utah Supreme Court the authority to act upon such claims. Petitioner's arguments that the Commission and the Utah Supreme Court have no jurisdiction in this matter should, therefore, be rejected by the court.

Finally, Petitioner contends in his petition for writ of certiorari that he made only a "special appearance" to challenge the jurisdiction over his person of the Utah Industrial Commission, and that he did not refuse to participate in the hearing before the Appeal Referee. Petitioner's contention that he made only a special appearance to contest jurisdiction is without merit. Petitioner made no mention of a "special appearance" until his appeal to the Utah Supreme Court. Petitioner's actions in this regard have been solely to attempt to improperly invoke the jurisdiction of the U.S. District Court for the State of Oregon by insisting that the Utah Industrial Commission transfer its records in this matter to the Federal District Court, without the filing of any pleadings in that court by Petitioner.

Petitioner further argues his case on its merits before this court. The factual issues raised by Petitioner before the Utah Supreme Court and this court would all be valid issues had Petitioner chosen to participate in the hearings provided for him. However, when Petitioner elected instead not to participate in the hearings, he prevented the Utah Industrial Commission from inquiring into the facts concerning whether he had earnings from his self-employment; whether his self-employment is secondary to his search for work; or even whether Petitioner should be entitled to benefits despite his

self-employment and any earnings he might receive therefrom, provided those earnings would be less than his weekly benefit amount. Petitioner by his own actions has prevented the Utah Industrial Commission from carrying out its responsibility to make findings concerning these matters. Under such circumstances, Petitioner has failed to establish his entitlement to unemployment benefits. Respondents herein pointed out to the Utah Supreme Court and again herein wish to point out to the Petitioner that he may at any time simply request reopening of his claim by the Utah Industrial Commission, whereby the Commission could then investigate to its satisfaction the question of Petitioner's involvement in self-employment and resolve the issue of his eligibility for benefits. Until Petitioner makes himself available to the Commission for a proper investigation of the facts of his eligibility, the Commission has properly denied him benefits.

CONCLUSION

The telephonic hearing procedure utilized by the Utah Industrial Commission for the hearing of interstate appeals in unemployment compensation cases does not violate the requirements of procedural due process as established by this court. The result in the court below is not in conflict with the decisions of the highest court of any other state, any federal court or this court and does not raise a substantial issue requiring resolution by this court. Jurisdiction of Petitioner's claim for unemployment compensation properly rested

with the Utah Industrial Commission and the court below. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 83-11

CARLOS L. JIMENA, Petitioner,

v.

BOARD OF REVIEW OF THE UTAH INDUSTRIAL
COMMISSION AND UTAH DEPARTMENT OF
EMPLOYMENT SECURITY, Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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FEDERAL LAWS INVOLVED

United States Code, Title 26, Sec. 3304(a)
(9)(A):

"compensation shall not be denied or reduced to an individual solely because he files a claim in another state (or***) or because he resides in another state (or ***) at the time he files a claim for unemployment compensation."

United States Code, Title 28, Sec. 1343(4):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."

STATE LAW INVOLVED

Utah Employment Security Act, Sec. 35-4-22,
(m) (1) :

"An individual is deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount. (underscorings supplied)

I. REFUTATION OF RESPONDENTS FIRST REASON

IN URGING THIS HIGH COURT TO DENY THE WRIT:

Respondents misunderstood the practical

application of the doctrine in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (cited on p. 6, Respondents' Brief in Opposition). This Court explained it in a subsequent case as follows:

"This Court in Mathews v. Eldridge,*** held that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability insurance benefits. We then granted petitions for writs of certiorari filed by the Secretary both in this case and in Mattern, supra, vacated the judgments below, and remanded the cases for further consideration in light of Eldridge." (Califano v. Yamasaki, 442 U.S. 682 (1979) at 690-1) (underscoring supplied)

Inasmuch as due process does not require oral hearing in disability insurance benefits as well as unemployment compensation claims, this Court held that affidavits are sufficient. To quote Commissioner v. Shapiro, 424 U.S. 614, 633 (1976): (again citing Mathews v. Eldridge)

"The Government may defeat a claim by a taxpayer that its assessment has no basis in fact - therefore render applicable the Anti-Injunction Act - without resort to oral testimony and cross-examination. Affidavits are sufficient so long as they disclose basic facts from which it appears that the Government prevail. The Constitution does not invariably require more. Gerstein v. Pugh, 420 U.S. 103 (1975); Mathews v. Eldridge, 424 U.S. 319 (1976)"

Now applying the aforequoted doctrines of Eldridge, Yamasaki and Shapiro to this case, it was a big mistake for respondents to require petitioner to submit to an inter-state telephonic hearing which is an oral hearing. This is not required by, and runs counter to Mathews v. Eldridge.

The record will show that petitioner submitted sworn statements containing all the facts necessary for the decision of the case (See R.0050-0052, verification appears at R.0043; quoted also in petitioner's brief before the Utah Supreme Court, Case No. 18901 at pp. 4-4B) as manifested in his motion filed before the Utah Board of Review (R.0044). The sworn statement was disregarded as shown by the fact that no reference was made to it by the decision of the Utah Board of Review. (p. A2-A8, Appendix to instant petition for certiorari)

In light of the above discussion, it will be unnecessary to go thru the three factors constituting the balancing test on due process

laid down by Mathews case. However, since respondents made an erroneous application of them to this case, petitioner will demonstrate to this Court those errors.

First. The first factor under the Mathews case is the private interest to be affected by the official action. This factor was restated in another case:

"The first step in the balancing process mandated by Eldridge is identification of the nature and weight of the private interest affected by the official action challenged." (Mackey v. Montrym, 443 U.S. 1, 11 (1979))

How petitioner was affected by the cutting of benefits is shown by the record as follows:

"The lack of customer response was complicated by a receipt of denial of benefits for unemployment compensation. Appellant faced, with the problem of expecting no income whatsoever even from his unemployment compensation decided to move to Portland." (R.0050-1, Sworn Statement)

"Appellant should not have moved yet out of Medford City, Oregon. But with the wrongful denial of his claim *** he was forced to move to Portland immediately incurring expenses of transportation. He used his car in pulling a trailer but *** it broke down *** spent about \$300.00 to put it back on the road but *** is beyond *** repair*** sold it as junk for \$50.00 and hired U-Haul truck for about \$110.00." (R.0054, Sworn Statement)

Second. The next factor to be considered is the risk of erroneous deprivation or loss of rights through the procedure used, as related to the probable value, if any, of additional or substitute procedural safeguards.

Interstate telephonic hearing as compared to the judicial proceedings in the U.S. District Court and to the bifurcated hearing to be conducted by the Hearing Referee of the Employment Division, State of Oregon (Barr v. U.S., 478 F. 2d 1152, 1156 (1973)); petitioner's quotation on p. 16 of his petition for certiorari was taken from syllabus no.7 which is criticized by respondents in their brief in opposition on p. 8) is the least preferable because telephonic hearing entails a higher risk of erroneous deprivation or loss of rights. The error is higher because the hearing officer in Utah does not see the demeanor of the witnesses. In the case of the hearing in the U.S. District Court, the judge hears and sees the witnesses. In a bifurcated hearing as discussed (already tested and approved in Barr v. U.S., supra) in the instant

petition for certiorari, pp. 16-17, the Referee likewise sees and hears the witness because he is bound to make findings of facts and conclusions of law. In Utah, hearing and seeing the witness are inseparable elements in determining the demeanor of a witness. (Crow v. Ind. Com. of Utah, 140 P.2d 321, 322(1943))

In discussing the second factor, the Mathews case recognized how critical is a witness credibility in the decision making process.

"a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process***" (Mathews v. Eldridge, supra, at 343-4)

"To be sure, credibility and veracity maybe a factor in the ultimate disability assessment in some cases." (Mathews v. Eldridge, supra, at 344)

It will now be seen that determining the credibility of a witness thru his demeanor is a part of the second factor of the balancing test. Thus the doctrine of Simmons v. District Unemployment Board, 292 A.2d 797, 800 (1972) holding that unless the demeanor of a witness is considered due process would be lacking is in harmony with Mathews case.

Third. The last factor to be considered is the government interest involved, including fiscal and administrative burdens that additional or substitute procedural requirements would impose on the government.

The last factor deals more on which procedure is more economical and burdensome. In a bifurcated hearing, the only expense is the tape which cost \$1.00 to \$3.50. No expense is needed for transcription unless the case goes on appeal which is needed anyway in any kind of proceedings. One tape which has a playing time of 90 minutes can accommodate the testimony of three witnesses depending upon the length of testimony. In a telephone hearing how much would be the phone bill for 90 minutes by long distance between Utah and Oregon? The result would be that instead of paying claimants benefits, respondents would be paying telephone bills.

Of the three alternative procedures, telephonic hearing, bifurcated hearing and judicial proceedings, the latter is the most costly. But if claimants want it, they may go to court.

Now let us discuss which of the alternative procedures is more burdensome. All that the referee in Utah does is to wait for the findings of facts and conclusions of law of the referee in Oregon. What respondents fear is lack of cross-examination of witnesses. (As already stated before, cross-examination and even oral hearing is not required in this case, see pp. 1-2 hereof. Petitioner is pursuing this line of argument to satisfy respondents.) This can be done in behalf of the referee and employer in Utah by the referee in Oregon. While the hearing is in progress in Oregon, the Utah referee or employer may tell the Oregon referee by phone what question to ask the witness by way of cross-examination. (Again the warning here is if those questions are long, it had better be included in the set of written instructions to be explained infra.)

What the Utah referee needs to send to the Oregon referee is a set of instructions similar to instructions to a jury including which instruction the Oregon referee has to make a cross-examination in behalf of the

employer. In this way the Oregon referee need not be familiar with the Utah law on unemployment compensation akin to jurors in a trial.

II. REFUTATION OF RESPONDENTS SECOND REASON TO DENY THE WRIT.

Petitioner's right to file unemployment compensation is primarily predicated on U.S.C. Title 26, Sec. 3304(a)(9)(A) quoted on page 1 hereof. Without the enactment of the latter law petitioner's right is already lost by virtue of his transfer of residence to Oregon from Utah. Hence, the Utah Employment Security Act operates secondarily to or to supplement that federal law concerning out of state residents. Petitioner's right exist and continuous to exist under federal law, not by virtue of the Utah Employment Security Act.

When petitioner filed his claim for unemployment compensation in Oregon Employment Division which is forwarded to Utah (or if petitioner files his case with the U.S. District Court in Oregon) he is in fact securing or recovering unemployment compensation under U.S.C. Title 26(a)(9)(A) providing for the

protection of a civil right as supplemented by the applicable state law, in this case the Utah Employment Security Act. This type of action falls within the original jurisdiction of the U.S. District Court in accordance with U.S.C. Title 28, Sec. 1343(4), quoted on p. 1 hereof.

Where jurisdiction is lodged is defined by law. It cannot be taken away from the U.S. District Court by failure to file a case or removal action.

Had petitioner filed a case in the U.S. District Court during the pendency of this case in Utah, respondents will invoke the doctrine of exhaustion of administrative remedies as they already argued before the lower court. (See p.6, Respondents Brief, Utah Supreme Court)

CONCLUSION

WHEREFORE, petitioner reiterates his prayer in his petition for a writ of certiorari. Respectfully submitted.

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